BUREAU OF LAND MANAGEMENT
v.
DAVID AND BONNIE ERICSSON

IBLA 82-559 Decided September 4, 1985

Appeal from decision by Administrative Law Judge L. K. Luoma finding no evidence of trespass so as to require payment of damages in consolidated grazing trespass proceedings AZ-020-3-245 and AZ-020-81-2.

Affirmed.

1. Administrative Procedure: Administrative Procedure Act -- Administrative Procedure: Burden of Proof

In a grazing trespass case initiated by BLM upon an order to show cause, the burden of proof is properly placed upon BLM as the proponent of the order sought to establish by substantial evidence the occurrence of cattle trespass.

2. Evidence: Generally -- Trespass: Generally -- Grazing Permits and Licenses: Cancellation or Reduction

In order to prove livestock trespass upon public lands alleged to have occurred when excessive numbers of cattle were grazed upon allotments of public land permitted for lesser numbers, some actual trespass must be shown to have taken place before the "access trespass presumption" can be applied to calculate damages.

3. Administrative Procedure: Administrative Procedure Act -- Rules of Practice: Evidence

Where on appeal BLM challenges findings made by an Administrative Law Judge on grounds that his findings concerning credibility of witnesses are inadequate to justify the decision as announced, the Board of Land Appeals will examine the record to determine whether, on the basis of all evidence, the findings made by the fact-finder are supported by credible testimony.

4. Administrative Procedure: Administrative Law Judges -- Rules of Practice: Appeals: Generally

In an appeal arising from a decision by an Administrative Law Judge, the Board of Land Appeals may make findings of fact and conclusions based upon the record on appeal. The entire record before the Board may be considered in determining whether the decision appealed from is in error, and an appropriate order entered.

APPEARANCES: Fritz L. Goreham, Esq., and Deborah Oseran, Esq., Department of the Interior, Office of the Solicitor, Phoenix, Arizona, for appellant; William L. Novotny, Esq., and Phillip Weeks, Esq., Phoenix, Arizona, for appellees.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

This appeal arises from a decision by Administrative Law Judge L. K. Luoma issued February 8, 1982, finding appellant Bureau of Land Management (BLM) had failed to prove that cattle under the control of appellees David and Bonnie Ericsson were in trespass on public land of the United States from 1976 until 1980. BLM claims on appeal that violations involving the Ericssons' livestock occurred as a result of over-use of grazing permits issued to Ericssons for specified numbers of cattle pursuant to section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1982), and Departmental regulations at 43 CFR Part 4100. At a hearing held in July 1981 in Phoenix, Arizona, pursuant to provision of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, 576 (1982), two actions against Ericssons were consolidated for hearing: The first was a notice dated March 12, 1981, of cattle trespass by Ericssons seeking damages for excessive grazing upon several allotments permitted Ericssons for the years 1976 through 1980; the second was an appeal by Ericssons from a BLM manager's decision dated March 27, 1981, canceling three of the Ericssons 1981 grazing permits and suspending a fourth. Both matters were consolidated for hearing by agreement of the parties. The Ericssons defense to both the March 12 and March 27 actions consisted of evidence that, while they controlled more cattle in each of the 5 years than they had permits for grazing on public lands, they had not exceeded the allowable number of cattle for any of their permits issued by BLM since they had placed all additional stock on fenced, private pasture in the vicinity of their permitted lands, located in the Kingman, Arizona, area, near Alamo Lake.

Judge Luoma's decision states the consolidated issues before him at the hearing to be "whether Ericssons committed a trespass or trespasses on the public lands involved and, if so, whether they were willful and what damages or sanctions should be imposed" (Decision at 4). The amount of damages claimed by BLM at the time of hearing was $ 321,462.68, based upon an asserted unauthorized use totaling 25,228 animal unit months. (In the context of this appeal, an animal unit month is defined by 43 CFR 4100.0-5 to mean the amount of forage needed to sustain a cow for a month.) The fact-finder concluded that BLM had failed to sustain the burden of proof as it

was obliged to do, so as to establish the trespasses as claimed, which in this case meant it was required to show that Ericssons had grazed livestock on Federal public land in excess of authorized permit use. 1/ The Administrative Law Judge dismissed the BLM order of March 12, 1981, which required the Ericssons to show cause why damages should not be assessed for cattle trespass, and vacated the decision of March 27, 1981, canceling and suspending the Ericssons grazing permits.

On appeal, BLM contends the Judge erred in three respects in his decision. First, BLM argues, when he assigned the ultimate burden of persuasion to BLM, the Judge acted contrary to provision of the APA, 5 U.S.C. § 556(d) (1982) and Departmental regulation 43 CFR 4.474(b). Under BLM's analysis of these evidentiary rules, there is an important distinction to be made between the March 12 show cause order (seeking damages for trespass) and the March 27 decision (ordering cancellation and suspension of grazing permits). According to this argument, the burden of proof in the trespass (show cause) proceeding should properly be placed upon Ericssons, but was erroneously shifted to BLM by the Judge when he consolidated both proceedings and when he refused to distinguish between the two actions while deciding the issue stated concerning trespass. Appellant, BLM, summarizes this position as follows:

> Because the hearing was of a mixed nature as the appeal and order to show cause were combined, the BLM accepted its burden of going forward and agreed to proceed first in the order of proof. R.T. [transcript of hearing] 1-11, 908. The Administrative Law Judge nonetheless assigned the burden of ultimate persuasion to the BLM in both the show cause and appeal matters as they both turned on the central issue of whether a trespass occurred. The "mixed nature" of the administrative hearing cannot simply be ignored: Only if the Respondents persuaded the trier of fact that the 1976-1980 trespasses did not occur would the government be unable to sustain its decision on appeal with respect to non-issuance and cancellation of the 1981 permits. Respondents clearly did not persuade the trier of fact that no trespass occurred. [Footnote omitted.]

(Statement of Reasons at 9, 10).

Appellant's second claim of error concerns the legal adequacy of the Administrative Law Judge's decision. BLM contends the Judge failed to make required findings concerning credibility of witnesses necessary to sustain and justify his conclusion. Such findings are needed, BLM argues, since the Judge's decision required him to choose between conflicting testimony concerning the locations of the Ericssons livestock. Finally, BLM argues the evidence at hearing fails to show that all the cattle in excess of permitted numbers grazed by Ericssons from 1976 to 1980 in the vicinity of their

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1/ A grazing trespass occurs when cattle are grazed on public land either in excess of permitted use, as was alleged in this case, or without a permit. Eldon Brinkerhoff, 24 IBLA 324, 83 I.D. 185 (1976).

permitted lands were on private pasturage. It is contended that such proof is required in order to sustain a finding rejecting BLM's claim for damages, because the burden ought to have been placed upon Ericssons to show the location of their cows was other than upon Federal lands, were they to prevail in the trespass case.

Ericssons answer BLM by contending that the burden of proof to show trespass on the public lands in this case is upon BLM, which agency is the proponent of the rule sought. The rule actually sought, according to Ericssons, is that Ericssons should be charged damages for trespass on the public lands and their grazing permits should be revoked or suspended. Ericssons argue that BLM failed to carry this burden by presentation of sufficient evidence to show occurrence of an actual trespass. Ericssons also contend the Administrative Law Judge's determination concerning facts at issue should be binding upon this Board, since it cannot observe the demeanor or judge at first hand the credibility of the witnesses upon whose testimony the decision must rest.

Since the claimed trespasses spanned the grazing seasons from 1976 to 1980, the parties, for convenience of reference, described the cattle feeding operation run by Ericssons according to the names of the owners of the cattle grazed. The Ericssons, except for a small number of their own stock which it appears were kept at their home place and their Federal allotments, did not own the cattle they pastured. Instead, they ran a feeding business, in which they contracted to pasture cattle for others. In the course of their business they received, put out to pasture or fed, and shipped at the end of the grazing season, cattle for other operators referred to as Mendeburu, 7A (Weisbart), Sonny Root, and Circle 3. At least one other contract feeder, Bob Duey, also contracted to feed Mendeburu cattle in the Alamo Lake vicinity during the 1976 to 1980 period (Tr. 1009). The BLM grazing year runs from March to February, but the grazing season occurs during the winter and spring months, when forage is at its peak. The total number of feeder cattle handled by the Ericssons each year was established by reference to brand inspection reports compiled when the cattle were shipped back to their owners and from cattle company receipts showing payment to Ericssons for grazing (Tr. 530). These records demonstrate 2/ that for each year, from 1976 to 1980, the Ericssons pastured more cattle than they were permitted for on public land (Tr. 550-55). The testimony of the Ericssons, their cowboys, and the brand inspectors, establish that all the cattle controlled by them were received and shipped in the approximate vicinity of the Ericssons allotted lands. Although the Ericssons hold permits from BLM for grazing the allotments, they are not the primary allottees. Altogether they hold permits for four allotments, and have a fractional interest in a fifth.

David Ericsson testified positively that all the cattle in excess of the permitted number allowed on public land by him or under his direction were on private fenced land belonging to eight private owners (Tr. 199-297).

2/ It is apparent the numbers of cows so derived are approximate. The brand inspectors who testified at hearing both stated they frequently inspected the same cows twice owing to circumstances surrounding shipment. The company cattle receipts may have been based in part upon the inspection reports.

He stated that the private pasture contained enough forage, when supplemented, to support the numbers controlled in each year from 1976 to 1980. In support of this testimony, Ericsson offered testimony by a number of private landowners. Their testimony uniformly supported Ericsson's. They all agreed that, in exchange for a combination of payments in cash, and labor, and other support, and based upon considerations of friendship, they had allowed Ericssons to place Ericsson feeder cattle on their fenced pastures (Tr. 51, 913, 955, 1028, 1060). They confirmed that the fences in place were generally adequate to contain the cattle pastured by Ericssons, or were repaired by the Ericsson crew so that they were adequate, and that adequate forage existed for the cattle received by them.

Thus, Billy Roer confirmed that he had pastured the Ericsson Mendeburu cattle in 1977 and had taken 7A cattle in 1978 and 1979 (Tr. 52-59). Tina Madril testified by deposition that she had accepted the Ericsson cattle on her fenced pasture for several years. Roy Ross testified that Ericssons pastured cattle on his Lincoln ranch in 1978 and 1979 (Tr. 917-21). James Miller described the use by Ericssons of the Lievas Ranch in 1978 and 1979 (Tr. 957-62). The largest of the private landowners, Kemper Brown, reported the terms of his agreement with Ericssons for pasturage from 1976 through 1981, and confirmed there was sufficient feed for large numbers of cattle on fenced pasture on his ranch in 1978. According to Brown, he made this pasture available to Ericssons in exchange for good will, and also accepted in exchange for the land use labor and services performed by the Ericssons and their crew (Tr. 1030-47). A more detailed description of the actual pasturage was given by Pat Hayes, Brown's ranch foreman, who personally helped handle and personally observed the cattle brought onto the Brown ranch by the Ericssons (Tr. 1065-68). Hayes later, at least once, helped drive some of the cattle along a pipeline to begin a trip to the Lincoln ranch where they would be loaded for shipment, according to his testimony (Tr. 1069).

Additionally, several of the Ericsson cowboys testified that the Mendeburu, 7A, Sonny Root, and Circle 3 cattle were pastured at the eight various private pastures, and described their manner of handling cattle (Tr. 971, 995, 1092). In the case of some of the cattle kept at the Kemper Brown ranch, one cowboy described overnight cattle drives which he stated took place in the 1978 to 1979 season across public lands to the Lincoln ranch for shipment (Tr. 1096).

A number of witnesses questioned this last occurrence; two miners who lived and worked near the route reportedly used for the cattle drives did not see the drives nor any sign of them (Tr. 1281, 1295). Both thought they should have noticed such events, had they taken place. Similarly, an adjacent rancher, Earl Hutchison, did not see any evidence of cattle drives in 1978 or 1979 and denied they could have occurred without his knowledge. He also reported an occasion when he found 100 7A cows on his ranch in 1979. Several other witnesses, farmers not actively engaged in cattle raising, testified that, although they were in a position to observe cattle drives of the type described by the Ericssons, they did not see them take place (Tr. 747-53).

Expert testimony concerning the quantity and quality of the forage available on the eight private landholdings was offered by both the Ericssons

and BLM. The Ericssons expert witness found the capacity of the land to produce feed for the cattle to be adequate to support the numbers claimed by BLM (Tr. 1060-71). BLM's expert witness, however, testified the private pastures lacked adequate forage to feed such numbers based upon his calculation of the probable productivity of the land (Tr. 1251-57).

According to BLM's Kingman Area Manager, the BLM analysis and decision to pursue a grazing trespass claim against Ericssons was based upon an investigation conducted by BLM employee, George High, and upon the brand inspection reports and cattle company receipts for the Ericssons feeder cattle (Tr. 550-55). High testified that his report, which concluded private pasture was inadequate to feed the cattle, was based upon interviews with the private pasture owners. The names of the pasture owners had been furnished to BLM by Bonnie Ericsson together with a report containing estimated numbers of cattle and estimated times when pasture had been furnished (Tr. 662-81).

Summarizing all the recorded evidence, the Administrative Law Judge's decision finds, "There was no eye-witness testimony to prove that the excess number [of cattle] were pastured in the public domain allotments" (Decision at 9). This observation correctly reflects the testimony at the hearing. BLM quite clearly seeks to infer the existence of excess numbers of cattle upon the Ericssons' allotments from the receipts showing they controlled more animals in the vicinity of their allotments than they were permitted to have. BLM's evidence presented at hearing did not include anyone who saw excessive numbers of cattle on the Ericssons' allotments. Two aerial inspections were made by BLM, on March 16, 1978, and on March 27, 1979. The 1978 flight revealed 14 cows on an allotment permitted for 25; the 1979 flight counted 200 to 250 cows on land where 500 were authorized. This situation was commented upon by the Phoenix Area Manager in a June 3, 1980, memorandum:

> Although, we are quite certain the cattle were on the range, we have not established that fact. A logical excuse, and one Ericssons have used previously is that the cattle were on irrigated pasture in the Wikieup Area. Perhaps investigation by Bruce Parker could answer that one. We did make one flight by airplane and the cattle were so scattered, with water in every canyon, that it was impossible to get a count considering the rough and brushy country. As you are aware several years ago we trespassed and collected from Mr. Anderson [an unrelated occurrence] based on shipping receipts (Ex. 2-1).

[1] Arguments concerning assignment of the burden of proof now addressed to this Board were previously urged before the fact-finder. BLM argues that the importance of the nature of the "show cause" proceeding brought under the March 12 notice mechanism was ignored by the fact-finder's decision, resulting in a material error in judgment concerning the effect of the evidence at hearing. BLM states its position to be:

> At issue during the hearing was the location of the excess cattle. On the issue of the testimony, the Administrative Law Judge concluded, without deciding, that the excess cattle could have been on private fenced pastures within the federal allotments under lease to Ericssons. (Decision pp. 8, 9.) Because the ultimate burden of persuasion was placed on the BLM to prove that the excess cattle were on the public domain, Respondents were not required to demonstrate that the excess cattle were actually on private pasture.

(Statement of Reasons at 10).

Judge Luoma resolved the issue presented by this argument as follows:

> The BLM interprets the statute and regulation as they apply to these proceedings to mean that, while the BLM is the "proponent of a rule or order" its burden is merely one of going forward with the evidence and that the burden of ultimate persuasion rests with Ericsson. Such conclusion obviously is based heavily on the fact that the proceeding is of a "mixed nature" involving both a grazing trespass and a grazing appeal, both of which were initiated by the BLM. As stated above, resolution of the entire matter rests upon the issue of whether a trespass or trespasses occurred as alleged by the BLM. Clearly this makes the BLM the "proponent of a rule or order" with the burden of proving its allegations with "reliable, probative and substantial" evidence. Bureau of Land Management v. Ross Babcock, 84 I.D. 475 (1977); Frank Halls, 62 I.D. 344 (1955). This does not mean that the proof must be beyond a reasonable doubt, as that standard applies only in criminal proceedings. Edwards v. Mazor Masterpieces, Inc., 295 F.2d 547 (D.C. Cir. 1961).

(Decision at 5).

The statute and regulation referred to by the decision are the provision of 5 U.S.C. § 556(d) (1982), which assigns the burden of proof in administrative hearings, and a Departmental regulation, 43 CFR 4.474(b), providing for the conduct of appeals before an Administrative Law Judge in grazing cases. The statute provides in pertinent part, that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." The regulation, 43 CFR 4.474(b), provides:

> (b) Unless the administrative law judge orders otherwise, the State Director or his representative will then make the opening statement, setting forth the facts leading to the appeal. Upon the conclusion of the opening statement, the appellant shall present his case, consistent with his specifications of error. (In the case of a show cause, the State Director shall set forth the facts leading to the issuance of the show cause notice and shall present his case following the opening statement.) Following the appellant's presentation, or upon his failure to make such presentation, the administrative law judge, upon his own motion or upon motion of any of the parties, may order summary dismissal

> of the appeal with prejudice because of the inadequacy or insufficiency of the appellant's case, to be followed by a written order setting forth the reasons for the dismissal and taking such other action under this subpart as may be proper and warranted. An appeal may be had from such order as well as from any other final determination made by the administrative law judge.

Judge Luoma correctly rejected BLM's argument grounded on the effect of this regulation. The proponent of the "rule or order" in the trespass proceeding was BLM; the "order" sought to be enforced was the assessment of damages against Ericssons in the amount claimed for livestock trespasses. See BLM v. Ross Babcock, 32 IBLA 174, 84 I.D. 475 (1977). No provision of the Taylor Grazing Act alters the provision of 5 U.S.C. § 556(d) (1982), placing the burden of proof other than upon BLM as the proponent of the order in this case. Nor does the regulation relied upon, as BLM seeks to show, further apportion the burden of proof other than in a manner permitted by the statute. Rather, it establishes the order of trial and provides for the manner of the presentation of evidence. While 43 CFR 4.474(b) does mention "show cause" proceedings, it speaks only to the order of presentation of evidence at hearing in those cases. The Administrative Law Judge correctly assigned the burden of proof to BLM, the proponent of the order sought in this case.

[2] Although not explicitly stated by BLM, the arguments advanced on appeal rest in part upon an inference sought to be derived from the evidence that the Ericssons had larger numbers of cattle in the neighborhood of their allotments than the Ericssons had permits for. Such an inference, denominated the "access trespass presumption" has been used by the Department in somewhat similar cases in the past. It has no application in this case, because the factual foundation required to raise the inference is lacking. The access trespass presumption arises only in certain very limited circumstances, as described in Holland Livestock Ranch v. United States, 655 F.2d 1002, 1006 (9th Cir. 1981), aff'g BLM v. Holland Livestock Ranch, 39 IBLA 272 (1979):

> The presumption at issue rationally infers that livestock with unrestricted access to contiguous public lands will use that access. The inference is supported by the evidence that the stock has previously made use of the access. Without the presumption, proving the existence of every trespass by livestock onto public land would be extremely difficult, if not impossible.
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> * * * Under the facts here, we need not decide whether unrestricted access will always give rise to a presumption of trespass. But where, as here, there is evidence of actual trespass in addition to unrestricted access, the Interior Board of Land Appeals may raise a rebuttable presumption of trespass based upon the existence of unrestricted access.

This decision left open the question of the effect of unrestricted access in the absence of proof of an actual trespass, a condition which, arguably, could have been a factor in the Ericssons situation since the Ericssons controlled four or five allotments and large numbers of cattle in same area. A later district court decision, however, Holland Livestock Ranch v. United

States, 543 F. Supp. 158, 161 (D. Nev. 1982), vacating and remanding Holland Livestock Ranch, 52 IBLA 326, 88 I.D. 275 (1981), further limits the applicability of this evidentiary device:

> Neither fairness nor a balance of probability here supports the creation of a presumption of trespass where livestock are found grazing on private land with unrestricted access to public land in absence of any evidence that such a trespass has in fact occurred. This does not mean that the Government must actually prove each individual trespass. Such a requirement would render the presumption useless. Rather, the presumption must properly be limited to situations where a particular landowner has livestock on his private land which have unrestricted access to public land and there is at least some evidence of actual trespass on the federal lands. In the view of the court, this conclusion constitutes a reasonable interpretation and application of the Ninth Circuit holding in Holland Livestock Ranch v. United States, 655 F.2d 1002 (9th Cir. 1981). The moment the presumption is used in administrative proceedings against private landowners where there is no showing that any actual trespass by livestock has occurred, it becomes irrational and arbitrary. [Emphasis in original.]

On appeal to the Ninth Circuit the district court was affirmed on this point in Holland Livestock Ranch v. United States, 714 F.2d 90, 92 (9th Cir. 1983):

> Holland I establishes the existence of a sound factual connection underlying the presumption. Yet our inquiry there was not limited solely to the plausibility of the presumed fact. The usefulness of a presumption is also a factor to be considered in assessing its validity. NLRB v. Baptist Hospital, Inc., 442 U.S. at 789-90, 99 S.Ct. at 2607; Holland I, 655 F.2d at 1006. In Holland I we observed that the presumption is necessary in measuring damages because demonstrating each individual trespass would be "extremely difficult, if not impossible." 655 F.2d at 1006. The law has long recognized that evidence showing amount of damage may be somewhat speculative once the existence of some damage is proved with certainty. Kissell Co. v. Gressley, 591 F.2d 47, 50 (9th Cir. 1979); C. McCormick, Damages § 27, at 101 (1935).
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> In contrast, the presumption is not necessary here. Proving that at least one animal has actually trespassed is not difficult, and imposes no undue burden on BLM resources. To make use of the presumption, agents would have to find some cattle on private lands with unrestricted access to public land. It will not add greatly to their labors to locate animals actually trespassing, if such trespasses are at all substantial.
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> * * * Presumptions should not replace proof needlessly. The access trespass presumption is reasonable enough to apply where needed to measure damages. We hold, however, that the

> presumption cannot stand where it is not needed: as the sole evidence to establish a claim of trespass. The government must prove some actual trespass before relying upon the presumption.

Ericssons own no private land of their own. They have the use of eight private pastures which were fenced from 1978 to 1980. They hold permits for four grazing allotments and part of a fifth. They are alleged to have placed excess numbers of cattle upon their permitted lands. Although they controlled numbers of cattle in excess of their permits in the vicinity of their allotted lands, no actual trespass by Ericsson cattle was shown. Under these circumstances the access trespass presumption has no applicability. Unaided by the use of this inference, therefore, the burden was upon BLM to show by "reliable, probative, and substantial evidence" that Ericssons had placed larger numbers of cattle than authorized upon their allotments. See, e.g., BLM v. Ross Babcock, supra at 184, 84 I.D. at 480 (1977), also a grazing trespass case initiated by show cause order, holding that while proof beyond a reasonable doubt is not required by the APA to be made in cases such as this, the burden to prove trespass by "substantial" evidence is upon BLM.

[3] In Babcock, the decision to assess damages for trespass was supported by proof showing that Babcock's cattle were actually found in trespass on Federal lands. In the case of Ericssons, however, the record contains no direct proof of unauthorized use in the manner claimed. 3/ BLM admittedly based its entire case against the Ericssons upon cattle inspection and shipment records, and upon the testimony of its range expert concerning forage potential of the private pastures. This evidence tends, circumstantially, to demonstrate that, had the Ericsson-controlled cattle been placed in the private pastures in the numbers shown to exist, they would have starved. There was a great deal of other evidence, however, to the effect that good rainfall in the area and supplemental feeding enabled the eight pastures to support the herds placed in them by Ericssons. BLM contends this evidence should not be considered because it was not specifically discussed by the fact-finder in his decision, and because he failed to make needed findings concerning the credibility of witnesses upon whose testimony he relied for his decision. It is correct, as contended, that no specific findings concerning demeanor or credibility appear in the decision. The record, however, contains a declaration by the Administrative Law Judge that he is actively assessing the credibility of all the witnesses who appear before him at the hearing; he admonishes counsel that he cannot permit continued leading questions for that reason, and he states:

3/ The contested testimony concerning the cattle drives, if believed, would establish that Ericssons crossed Federal lands without a permit in violation of 43 CFR 4130.4-3. This conduct was not charged by BLM in either the March 12 or March 27 actions and was not an issue at hearing. Neither this circumstance nor the finding of 100 7A cows on a neighboring allotment tend to show actual violations of the type claimed to exist by BLM, since neither indicates overuse of the permits issued to Ericssons. In the case of the 100 7A cows, of course, there was also no showing they were controlled by Ericssons.

> Just a minute, please. I don't want you to be doing the testimony for these witnesses. From what I heard of the opening statements, I am presumably going to have a job of deciding credibility of witnesses and to me in this case I think it's going to be very important.

(Tr. 55-56).

Also, his decision does refer, albeit indirectly, to the witnesses' credibility question raised by BLM; the decision recites, speaking of the private pasture testimony, at page 9:

> There was no eye-witness testimony to prove that the excess numbers were pastured in the public domain allotments. On the other hand there was a substantial amount of eye-witness testimony, if given full credence, to support the finding that the excess numbers were in fact pastured on the privately-owned lands. Such testimony would also support the finding that the fences on the privately-owned lands were brought to a state of repair adequate to contain the Ericsson cattle during the periods of use. The BLM presented expert testimony attempting to show that the carrying capacity of the privately-owned lands were not sufficient to properly graze the total of the excess numbers. Ericsson countered with the expert testimony on carrying capacity, together with testimony of having provided some supplemental feed as needed, which taken together would substantiate a finding that the excess numbers could have been sustained on the privately-owned lands alone.

This finding must be read in conjunction with the conclusions which immediately follow it, which recite that the private pastures "were properly fenced during the times the lands were used by Ericssons." When so read, the decision leaves no doubt the fact-finder did give credence to the testimony by Ericssons, their cowboys, and the private landowners concerning the Ericssons use of private pasture. Clearly, he accepted their testimony concerning the adequacy of the pastures to support the herds which were excess to the Ericssons permits. Since the testimony of these persons was neither inherently incredible nor inconsistent, there is no apparent basis for this Board to reject it. 4/ See State Director for Utah v. Edgar Dunham, 3 IBLA 155, 162-63, 78 I.D. 272, 275-76 (1971), another grazing trespass appeal, where this Board observed in this regard:

4/ Ericssons argue to this Board that it lacks authority to reject fact-finding by the Administrative Law Judge where credibility is necessarily a factor in weighing the evidence. This is not correct. The Board possesses the review authority of the Secretary. 43 CFR 4.1. It has the full authority to reject part or all of the fact-finder's decision in the exercise of that authority, but will not do so without a reasonable basis or legal reason. See Dunham, supra; Brinkerhoff, supra.

> Witnesses are on occasion affected by bias, partisanship, overzealousness, and other constraints. We do not intend to suggest any failing in the witnesses in the hearing below. We simply must accord proper weight to the fact findings of a hearing examiner where they depend primarily on the credibility of the witnesses and are supported by substantial evidence. As indicated above, the appellant has chosen to make such findings the gravamen of this appeal.
>
> In that frame of reference, examining the fact findings of the examiner, we see no compelling reason to reverse them. Admittedly the appellee's testimony was not free from contradiction. However, the cold words of a record are no substitute for the exercise of the examiner's evaluation of the veracity of the witnesses. We find that the examiner's conclusions are supported by substantial evidence. [Footnote omitted.]

Furthermore, the testimony of the ranchers and cowboys that the private pastures, as supplemented, contained enough forage for the contract cattle was supported by the Ericssons expert. He analyzed the stock carrying capacity of the eight pastures somewhat differently than the BLM expert, with a resulting conclusion that the pastures were adequate to the number of cattle fed by Ericssons. Taken as a whole, there is substantial evidence in the record to establish that Ericssons could have supported the cattle they contracted to feed on the private pasture available. Further, there is substantial evidence to show that they did, in fact, use the private land for that purpose.

[4] Also unpersuasive is BLM's contention that the decision is in error because it fails to make a finding in support of the conclusion reached that the Ericssons cattle were on private pasture for the period of 1976 through 1980. The decision recites, at page 10, that:

> Based on the sum of the evidence presented I find that the privately-owned lands were properly fenced during the times the lands were used by Ericssons, precluding application of the "access" theory of trespass as enunciated in Bureau of Land Management v. Holland Livestock Ranch, et al., 86 I.D. 133 (1976) and affirmed in Holland Livestock Ranch v. United States of America, __ F.2d __ (9th Cir. Sept. 8, 1981). I also find that sufficient feed was available to sustain the excess numbers within the privately-owned lands during the periods of time at issue.

Since the decision finds the Ericssons cattle were not in trespass as alleged, having first stated the alternative, that they were in private pastures, both the intent and meaning of the language used amount to a finding the cattle were kept in private pasture during the critical period. The period of the alleged trespass was long, and there were many transactions involving the cattle over the 5-year period examined by the hearing; the Administrative Law Judge clearly refers to the entire period and negates the possibility of any liability for excess grazing in any period during the 5 years considered. To clarify any ambiguity which might be present in the decision by Judge Luoma,

however, this Board now finds, as a fact, on the basis of the entire record on appeal, that the Ericssons cattle, in numbers as shown by the inspection and cattle shipment receipts for the years from 1976 to 1980, were pastured on private pasture and were, therefore, not kept in numbers in excess of the permitted amounts on public lands. The Board finds the Administrative Law Judge's decision, construed as an entire document, to be to the same effect. The decision restates it is "based upon the sum of the evidence presented." It discusses the evidence so as to exclude any other possible result than rejection of the BLM claim. It is not necessary that the decision of the fact-finder mention every fact placed in evidence, so long as it fairly and completely indicates he considered the relevant evidence of record in reaching his conclusion. United States v. Lee Chartrand, 11 IBLA 194, 80 I.D. 408 (1973). The decision as written is sufficiently detailed so as to adequately explain the factual basis for the conclusions stated. Since the record in this appeal consists of 1388 pages of reporter's transcript, plus several inches of exhibits to the transcript, briefs of counsel, and the BLM case file, some abridgment was required. The decision appealed from correctly finds the facts based upon the recorded evidence, and draws the necessary conclusions based upon the facts found and the applicable law.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING IN PART AND DISSENTING IN PART:

The record developed at the hearing below is voluminous. Despite this fact, or possibly because of it, the resolution of the myriad factual disputes between the parties is no clearer now than at the commencement of the hearing. Administrative Law Judge Luoma determined that the Government had failed to establish any trespass and accordingly dismissed the trespass action. As a logical concomitant, since it was undisputed that but for the alleged trespass appellees' request for a renewal of grazing licenses would not have been denied (Tr. 649, 778), Judge Luoma also vacated the decision denying appellees' grazing application. The majority affirms Judge Luoma's actions. Inasmuch as it is my view that, while to a certain extent the Government has failed to carry its burden of proof as to the occurrence of some of the multiple trespasses alleged, the weight of the evidence, nevertheless, establishes that certain trespasses did exist. Accordingly, I cannot agree with the blanket affirmance of Judge Luoma's decision.

Initially, however, I wish to note my agreement with the major legal holding of the majority, viz., that the Government has the ultimate burden of persuasion in establishing that a trespass has occurred. First of all, I think the Government's reliance on 43 CFR 4.474(b) is misplaced. As the majority correctly points out, nothing in this regulation purports to establish who has the burden of proof. Rather, this regulation merely provides for the order of proceeding in the hearing. Indeed, since the regulation commences with the statement that "[u]nless the administrative law judge orders otherwise, the State Director or his representative will then make the opening statement, setting forth the facts leading to the appeal," were we to deem this regulation to allocate the burden of proof, we would be faced with a regulation which purported to authorize the Administrative Law Judge to shift the burden of proof in any specific case as he or she deemed fit. I do not believe that such authority could be vested in an Administrative Law Judge consistent with the entire tenor of the Administrative Procedure Act.

Second, to make a permittee show that a trespass had not occurred is to require that the permittee prove a negative. If this rule were to be strictly enforced, upon an allegation that a permittee had illegally grazed 10 head of cattle on the Federal range sometime in the past year, it would be the permittee's burden to establish for each specific day of the past year that his or her cattle were not in trespass. Such a burden would be virtually impossible to discharge.

Third, the Government's argument that a permittee has the burden of showing that a trespass did not occur ignores the underlying premise of what has come to be known as the "access theory" of trespass. As we have noted in a number of cases, where the Government has established that cattle have been grazing on land with unrestricted access to public lands, and the Government

can further show that some actual trespass of the public lands has occurred, 1/ a presumption may be established that all of the cattle on the private land grazed on the Federal land in the same proportion as exists between the public land and the private land in the area. See Bureau of Land Management v. Babcock, 32 IBLA 174, 184, 84 I.D. 475, 480 (1977); Nick Chournos, A-29040 (Nov. 6, 1962). What the Government in this case has ignored is that the presumption which arises is a rebuttable presumption whose whole purpose is to shift the burden of proof from the Government to the alleged trespasser. If, as is contended by the Government, the trespasser had the burden of proof in the first instance, the presumption would be irrelevant and the "access theory" would serve no purpose. All things considered, I think it clear that in a trespass proceeding the Government is the proponent of the rule and, as such, bears the ultimate burden of persuasion that a trespass has, in fact, occurred.

I also believe that the majority correctly rejects appellees' broad assertion that the Board lacks authority to overturn findings of fact by an Administrative Law Judge where credibility is necessarily a factor in his weighing of the evidence. The fact of the matter is that this Board possesses the full authority of the Secretary to review all matters de novo and, while findings of fact based on credibility will not be lightly set aside (see United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417-18 (1973)), such findings are not immune from reversal in the proper circumstances (see Lawrence E. Willmorth, 64 IBLA 159 (1982)). I think that these principles are particularly apt in the instant case where there is a notable lack of fact finding in the decision below.

The amount of testimony essentially in conflict is considerable. Rather than review the vast areas of testimonial conflict, however, I will limit my review to that part I find most pertinent. Thus, Dave Ericsson testified that in the 1978-79 grazing year he had between 2,500 and 3,000 head of cattle on Kemper Brown's private lands (Tr. 204). Ericsson testified that these cattle were not shipped from Kemper Brown's property, but rather were driven along the El Paso pipeline for 30 miles to the Lincoln Ranch, taking between 3 to 4 days (Tr.210), crossing both the Tenahatchipi and Cunningham Passes, and then were driven further to Alamo Lake from where they were trucked out (Tr. 214). As subsequent testimony made clear, these cattle were allegedly driven in groups of between 500 and 600, by a crew consisting of from three to five individuals, two of which, Clair DeWitt and Ben Overson, testified in behalf of Ericsson (Tr. 1000, 1196). Pat Hayes, foreman for the Kemper Brown Cattle Company, testified that he once accompanied the drive across Highway 60 up to Cunningham Pass (Tr. 1069). With reference to the drive, Clair DeWitt testified that they did not feed hay too often (Tr. 1007). Ben Overson, another cowboy on the drives from Kemper Brown to Alamo Lake, stated that the cattle were fed at night with hay brought in by a pickup and a trailer (Tr. 1109). Ericsson testified that the cattle were fed between 20 to 30 bales of hay each night brought in by a pickup truck (Tr. 1202-04).

1/ The requirement that at least some instances of actual trespass be observed as precondition to application of the "access theory" was established by the Ninth Circuit Court's decision in Holland Livestock Ranch v. United States, 714 F.2d 90 (1983).

In contrast to this testimony was the testimony of Earl Hutchinson who was the Federal licensee for the Harcuvar allotment. After descending from Cunningham Pass, the El Paso pipeline bisects the Harcuvar allotment before entering the Lincoln Ranch. Hutchinson termed the possibility of Ericsson driving a total of 2,500 to 3,000 head of cattle through his allotment without his knowledge as "ridiculous" (Tr. 751). He subsequently testified that with only 3 to 4 cowboys it would be impossible to drive 500 head of cattle across unfamiliar terrain (Tr. 1213-14). Ericsson had testified that he was able to cross Hutchinson's entire allotment in 1 day (Tr. 1193). Doing so, however, would necessitate spending the night in Cunningham Pass. Hutchinson, referring to the fact that Wendon Road also crossed the range at Cunningham Pass, expressed the view that it would be impossible to spend the night there with the traffic on the road going to and from Alamo Lake (Tr. 1215).

This view was essentially corroborated by the testimony of Roland Cole, a highway patrol sergeant whose jurisdiction included both the Wendon Road and Highway 60, that he had never heard of cattle crossing Highway 60, as would be necessary in order to reach Lincoln Ranch down the El Paso pipeline. He further opined that it would be very difficult to do so unless the road was closed (Tr. 1359).

Of particular relevance was the testimony of two brothers, Arie and Ted Hilbrands, who in the first week of January 1979, commenced operating the old San Marcos Mine which is located approximately 1 mile north of the Kemper Brown Ranch, and northeast of the Tenahatchipi Pass. The El Paso pipeline crosses Tenahatchipi Pass approximately 1-1/4 mile from their claims, descends into McMullen Valley and eventually exits across Cunningham Pass. From their claims, the Hilbrands have a view of the entire valley. Moreover, since they are engaged in cyanide leaching, they travel across the pipeline road at least twice each day to get water (Tr. 1278). Both brothers testified that they neither saw any cattle being driven across McMullen Valley nor any physical evidence that cattle had passed in large numbers down the pipeline road (Tr. 1281, 1295).

Thus, the testimony is in virtually direct conflict. I note appellees' attorney tried to deprecate all of the Government's testimony on the ground that it was essentially "negative" in nature. I fail to see the relevance of this point. If an individual were to allege that he had traveled to the center of the earth and the only evidence presented against this allegation was the testimony of eminent scientists that this was impossible, would a court be required to rule that the trip had occurred since all of the evidence to the contrary was "negative" in nature? Of course not. Rather, a court would weigh all of the evidence to determine which was more credible, giving due weight to the demeanor and believability of the witnesses, and not simply resort to some mechanistic formulation that "positive" testimony is inherently superior to "negative" testimony. This is particularly true where the testimony is fundamentally irreconcilable, since false or perjured testimony is quite capable of being presented in a "positive" form.

The decision below, however, is less than satisfactory on this point. I think it useful to set out Judge Luoma's entire discussion of the substantive issues before him:

> There was no eye-witness testimony to prove that the excess numbers were pastured in the public domain allotments.

> On the other hand there was a substantial amount of eye-witness testimony, if given full credence, to support the finding that the excess numbers were in fact pastured on the privately-owned lands. Such testimony would also support the finding that the fences on the privately-owned land were brought to a state of repair adequate to contain the Ericsson cattle during the periods of use. The BLM presented expert testimony attempting to show that the carrying capacity of the privately-owned lands was not sufficient to properly graze the total of the excess numbers. Ericsson countered with expert testimony on carrying capacity, together with testimony of having provided some supplemental feed as needed, which taken together would substantiate a finding that the excess numbers could have been sustained on the privately-owned lands alone.
>
> Based on the sum of the evidence presented I find that the privately-owned lands were properly fenced during the time the lands were used by Ericsson, precluding application of the "access" theory of trespass as enunciated in Bureau of Land Management v. Holland Livestock Ranch, et al., 86 I.D. 133 (1979) and affirmed in Holland Livestock Ranch v. United States of America, __ F.2d __ (9th Cir. Sept. 8, 1981). I also find that sufficient feed was available to sustain the excess numbers within the privately-owned lands during the periods of time at issue.

(Decision at 9-10).

What is reasonably clear from a reading of the foregoing is that rather than premise his holding on findings of credibility, Judge Luoma eschewed this type of analysis. Thus, Judge Luoma did not find that 2,500 to 3,000 head of cattle were grazed at Kemper Brown Ranch and then driven along the pipeline to the Lincoln Ranch. All that is actually "found" in his decision was that the privately-owned land was properly fenced and that feed was available for the cattle on privately-owned lands. There is no affirmative finding that Ericsson did, in fact, graze the cattle under his control on the privately-owned land. In his conclusion, Judge Luoma simply stated that BLM "failed to prove that the excess numbers were pastured on or trespassed upon public domain allotments as alleged" (Decision at 10).

In light of the above, I do not feel the deference which is traditionally given to the decisions of an Administrative Law Judge where such a decision is premised on demeanor evidence is properly applied. Nowhere in his decision is there any indication that Judge Luoma believed that the testimony of Ericsson, Overson, and the DeWitts was more credible than the testimony of Hutchinson, Cole, and the Hilbrands. The mere fact that Judge Luoma ruled against the Government does not necessarily establish that he found appellees' witnesses more credible since, as Judge Luoma correctly found, the Government bore the ultimate burden of persuasion. Rather, his ultimate decision could well be the product of an inability to discern which of the witnesses was credible at all.

In any event, I think it unlikely that credibility findings ultimately animated Judge Luoma's conclusions. It seems to me that Judge Luoma's

ultimate determination was premised on a view that the Government's entire case depended upon application of the "access theory" of trespass, a view shared by the majority herein. While I agree that certain elements of the Government's case were, indeed, based on the access theory, it is my view that other parts of its case proceeded on a different legal premise.

The Government was faced with a situation in which it could prove that large numbers of cattle were under the control of Dave Ericsson. These amounts were greatly in excess of his permitted use. Accordingly, BLM sought an explanation from Dave Ericsson as to the presence of these cattle for which he had no BLM permits. Ericsson told BLM that all of the excess cattle were grazed on private lands and that his wife, Bonnie, kept the figures and would inform BLM where the cattle had been pastured (Tr. 270). On October 20, 1980, Bonnie Ericsson submitted a list to BLM. See Exh. 2-1. In this list, she indicated that they had grazed 1,355 head of cattle on the Bar IL and Bagdad pasture in 1977-78, 1,125 head on the Bagdad pasture in 1978-79, and 1,125 head on the Bagdad pasture in 1979-80. Ericsson later argued that this was in error and that he had only 50 head of cattle at Bagdad for the periods in question (except for 1977-78 when he had none) (Tr. 287-90). Dave Ericsson explained this discrepancy by noting that his wife did not have her records when she wrote to BLM in 1980 and was trying to reconstruct past events from memory.

The list submitted by Bonnie Ericsson also showed Billy Roer as pasturing 150 head of cattle in 1977-78, and 500 head in 1978-79, and 1979-80. When approached by the BLM investigator George High, Roer stated that he had no agreement with Ericsson and while he had some of Ericsson's cattle on his property, they were in trespass. See Exh. 18. At the hearing, he stated that he had an agreement with Ericsson and that he had pastured 400 head of cattle in 1977-78, and 600 head in 1979-80. When confronted with this discrepancy between his present recollection and his past statements he simply said "Hell, I might not have told him [George High] the same thing, 'cause he didn't come that day and say I was under oath, and I didn't know how serious the thing was" (Tr. 92).

Unfortunately, the fact that Bonnie Ericsson did not have accurate records in her possession or that Billy Roer did not realize that the matter was serious was not communicated to BLM when it was investigating the case. So it is not surprising that when BLM kept discovering that the figures provided by Bonnie Ericsson were not correct it surmised that if the cattle were not where the Ericssons said they were they might well have been on the Federal range. The position of BLM was simply a matter of logic. If Ericsson admitted that he had cattle greatly in excess of his permitted use during the years in question, and if interviews with various individuals indicated that, contrary to the list submitted by Ericsson, they had nowhere near the number of steers which Ericsson alleged on their private lands, one need only glance at a map of the area (Exh. 1) to conclude that if they weren't where Ericsson said they were, they were probably on the Federal range.

This theory, however, is fundamentally different from the access theory, which admits that the cattle may have spent some time on private lands but gives rise to a presumption of trespass either because of the state of disrepair of the fences separating the cattle from private lands or the presence

of either water or forage on the public lands which is lacking on the private lands. Admittedly, with reference to Jay Runston's and Tina Madril's private lands, there were elements of the "access theory" present to the Government's case. I agree with both Judge Luoma and the majority that, insofar as these matters were raised in the hearing, there exists substantial evidence which could establish that there was sufficient forage and that the fences were, at that time, in a state of repair. But, with regards to the amount of cattle at Kemper Brown Ranch, there is no question of utilizing the access theory at all. It is clear from the record below that the Government's basic premise was that there were no significant numbers of Ericsson's cattle at that ranch, period.

Counsel for appellees makes much of the fact that Kemper Brown was never interviewed by BLM in its investigation. Pat Hayes, the Kemper Brown foreman, was interviewed, however, and he, to a large extent, supported Ericsson's allegations. See Exh. 18. The problem is, and this is made crystal clear by the record, that the BLM officials simply did not believe either Pat Hayes or Dave Ericsson. BLM had already ascertained from shipping records that no cattle were shipped from the Kemper Brown Ranch. Ericsson subsequently alleged that all of these cattle were shipped from Alamo Lake, over 35 miles away. Not only was BLM puzzled by the obvious conundrum of having cattle which had been sent to Ericsson for fattening being driven 35 miles for shipping when they could have just as easily been shipped from the starting place, it had the evidence of four individuals, three of whom were clearly disinterested parties, that no such drives had ever occurred.

Recognizing that Judge Luoma's ultimate conclusion may have proceeded from an erroneous legal premise and, in the absence of specific credibility findings, I think this Board would be justified in examining the record de novo and reviewing the evidentiary conflicts in the light of experience and inherent probabilities. Based on my examination of the entire record, I do not find it credible that numerous trips down the El Paso pipeline with the number of cattle involved could have occurred without either of the Hilbrands, or Hutchinson or Cole having seen or been aware of the crossings. Thus, I must conclude that no cattle were grazed on Kemper Brown's ranch, and I think it entirely in accord with logic to further conclude that the 2,500 to 3,000 head of cattle were, in fact, willfully trespassed on the Federal range. I would assess trespass damages for these cattle.

But, even if I were to conclude that Judge Luoma did find that the testimony of the Hilbrands brothers, Cole, and Hutchinson was not credible, for whatever reason, I must suggest that his ultimate decision and the majority's affirmation is necessarily inconsistent with the factual predicates thereof.

If we accept Ericsson's allegation that he trailed 500 to 600 head of cattle 35 miles across public lands on four or five separate occasions, we have necessarily established that he was in trespass. It is a demonstrable violation of the Federal range code to trail or cross the Federal range absent the obtention of a permit from BLM. See 43 CFR 4130.4-3, 4130.5-1(c). When Ericsson was asked whether he had obtained a crossing permit, he

responded "No, I don't think I had to. That's an El Paso right-of-way and I don't believe, as long as you don't graze on it, I don't believe you need one. If I had thought so, I sure would have got one" (Tr. 1198). When he was reminded that the right-of-way went right through George Hutchinson's allotment he explained:

> That's right, but I didn't go out on -- I knew he had been suing me and accusing me of stealing and everything, I didn't figure it was worth the time, you know, he'd of just said no. If he would stopped me, I had to get there, if he would have stopped me up there, I would have just said, well, I'm sorry. I wasn't using his water, his grass, or anything else. I never stayed over on his range.

(Tr. 1198-99).

The grant of a right-of-way for an oil or gas pipeline under 30 U.S.C. § 185 (1982) does not remove the land traversed by the pipeline from the Federal domain. See 43 CFR 2881.1-3. Thus, when Ericsson admitted that he trailed cattle across Federal lands down the El Paso right-of-way without a crossing permit, he necessarily established that, to that extent at least, he had trespassed on the Federal lands. I think the majority clearly errs, even granting its ultimate conclusion that the cattle in question were grazed at Kemper Brown's ranch, when it fails to assess trespass damages for this admitted action on Ericsson's part. 2/

Finally, in light of the fact that it is my view that Ericsson willfully trespassed on the Federal range I would affirm the decision denying renewal of appellees' grazing license.

James L. Burski
Administrative Judge

2/ In all honesty, I cannot place great credence in Ericsson's assertions that the cattle were hay fed on the entire trip. Even assuming that the cattle were kept on Kemper Brown's ranch, I would assess full trespass damages for all days that the cattle were allegedly crossing.